IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.539 OF 1991

Nagnath Tuljaram Tate
(Since deceased by his heirs) ...Appellants
Vs.
Bhabatmal Adaji Shaha & Ors. ...Respondents

Mr S.G. Deshmukh for the Appellants.
None for the Respondents.

CORAM : A. S. OKA, J.
DATE : MARCH 09, 2006.

JUDGMENT:

1. On 06th March, 2006 when this Appeal was called out, none appeared for the Respondent Nos.1 and 3 and therefore, the Appeal was adjourned to 07th March, 2006. On that day none appeared for the Respondents and therefore, I heard the submissions of Shri Deshmukh appearing for the Appellants. Today also none appears for the Respondents.

2. The Appellants are the legal representatives of the original claimant. The case of the original claimant is that on 08th September, 1985 at about 02.30 p.m. he was proceeding from Shama Nagar towards Chitale Hospital at Solapur. He was proceeding on a bicycle. When he was near traffic island, a matador owned by the Respondent No.1 came in very high speed and gave a dash to the claimant as a result of which he fell down and sustained injuries to his buttock and

left leg. He was admitted in civil hospital at Solapur as an indoor patient from 08th September, 1985 to 13th October, 1985 and continued to receive treatment as an outdoor patient from during period 13th October, 1985 to 07th November, 1985. In November 1985, he was admitted as indoor patient in a private hospital for five days and subsequently transferred to Wadia Hospital. Till the date of filing of Claim Petition, he was under treatment. His age at the time of the accident was fifty years and he was working as a mechanic with the Maharashtra State Road Transport Corporation at Solapur and was drawing monthly salary of Rs.1,200/-. During the pendency of Claim Petition, on the ground of his physical unfitness, he was removed from the employment with effect from 01st January, 1987. The Claim Petition was opposed by the Respondent No.1 by contending that the claimant was riding the bicycle disregarding the rules of traffic and was passing by wrong side of the road and it was due to his negligence that the accident had taken place. In so far as the Respondent No.3 is concerned, there is no dispute that on the date of accident the matador involved in the accident was insured with the Respondent No.3-Insurance Company. One of the contentions raised by the Insurance Company was that the driver of the matador was not holding a valid licence.

3. The learned Member of the Tribunal dismissed the Claim Petition by holding that the claimant himself was negligent in riding his bicycle. The Tribunal came to the conclusion that he was riding the bicycle by wrong side of the road.

4. Shri Deshmukh appearing for the Appellants has taken me through the record of the case. He pointed out that considering the nature of the accident, it was obvious that doctrine of res ipsa loquitur will apply to the present case. He submitted that the accident took place near traffic island and the driver of the matador had more than sufficient opportunity to avoid the accident as the matador was taking left turn. He submitted that the finding on the issue of negligence recorded by the Member of the Tribunal is totally erroneous. He pointed out that even assuming without admitting that the Appellant contributed to the accident to some extent, still there was negligence on the part of the driver of the matador. He pointed out that during the pendency of this Appeal the original claimant expired and his legal representatives have been brought on record. He submitted that Tribunal has taken hyper-technical view of the matter and has erroneously dismissed the claim.

5. P.W. 2 Tulsidas claims to be an eye-witness. All that he has deposed is that the matador was coming in a very high speed from the side of milk dairy. He stated that after receiving dash from the matador, the cyclist dashed against the traffic island. P.W. 3 Suresh is a Police Constable who was on duty at the relevant time with Sadar Bazar Police Station. At the time of accident, he was proceeding towards his residence for lunch. He stated that he saw one cyclist coming from side of Shama Nagar and he was proceeding towards City Bus Depot. He stated that he was riding the bicycle from the western side of the fountain. He stated that he saw matador coming from the side of circuit house and gave a dash to the cyclist. He stated that the matador was in high speed. He rushed towards the place of accident and the injured was sent in an auto-rickshaw to civil hospital. In the examination-in-chief, he has stated that the Appellant was riding the bicycle from western side of the fountain and in the cross-examination he has stated that the cyclist was proceeding towards Sat Rasta Chowk without taking a round to the traffic island and he was going by wrong side of the road.

6. At this stage, it will be necessary to refer to a sketch which is produced on record by the Respondent No.1 and which is referred to by the

learned Member of the Tribunal. The said sketch submitted by the Advocate appearing for the Opponent No.1 shows the location of the spot of the accident. The spot of the accident indicates that while coming from Shama Nagar the cyclist instead of taking a round around the traffic island had gone on the wrong side of the road. However, the Police Constable who is an eye-witness has stated that at the time of the accident the cyclist was on the western side of the traffic island. Going by the sketch produced by the Respondent No.1, if the cyclist was on the western side of the traffic island, obviously, he was not on the wrong side of the road. Taking the sketch produced by the Respondent No.1 as true and correct and considering the position of the matador shown on the sketch, it is obvious that even the driver of the matador was trying to by-pass the traffic island and was trying to take a turn directly towards the western direction. The Police Constable examined on behalf of the Appellant has stated that the cyclist was on the wrong side. It is very difficult to discard the said statement. It is obvious from the sketch that even the driver of the matador was on the wrong side in the sense that without taking a turn around the traffic island, the driver of the matador seems to have attempted to turn towards the western direction. It is pertinent to note that the owner or the driver of

the matador have not been examined. In any event the driver had ample opportunity to avoid the accident. Taking the sketch produced by the Respondent No.1 as it is, the obvious conclusion is that both the driver of the matador and the original Appellant have contributed to the accident. It is obvious that that there was negligence on the part of the driver of the matador and to that extent finding recorded by the Member of the Tribunal is erroneous.

7. The exhibited documents on record show that on the date of the accident the Appellant was admitted to Dr. V.M. Medical College and General Hospital and underwent a surgery on 13th September, 1985 by which a plate was fixed in his leg by using nails. Follow-up Card issued by Dr.V.M. Medical College and General Hospital shows the nature of injuries sustained by the Appellant. He had injury on the head and a fracture in the left leg. The record of Wadia Charitable Hospital may not be helpful to the Appellant as it shows that later on Appellant suffered tuberculosis which has nothing to do with the injuries sustained. There is a certificate of Civil Surgeon, Solapur dated 01st January, 1987 which records that he sustained head injury with fracture of left femur on 08th September, 1985 and he was found unfit for further service. So the nature of injuries sustained by the

Appellant is fracture of left femur and injury on head. The plate and nails fixed were removed when the Appellant was later on admitted to Wadia Charitable Hospital in November 1985. The learned Member of Tribunal had called for necessary record of the employment of the Appellant. There is a certificate issued by Deputy Controller of S.T. Corporation, Solapur stating that the Appellant was working in the organisation from 24th March, 1967 and his services were terminated with effect from 01st January, 1987 from the organisation as he was declared medically unfit by the civil surgeon. His date of birth is stated to be 10th August, 1935. Thus, on the date of the accident the age of the Appellant was about fifty years. Record submitted by the State Transport Corporation shows that actual take-home salary in November 1986 drawn by the Appellant was Rs.125.70/-. It is obvious from the record that he was declared medically unfit as a result of injury sustained in the accident. Taking the monthly income of the Appellant as Rs.125, the multiplier of 8 will have to be applied. Thus, the Appellant will be entitled to compensation of Rs.12,000/- (125 X 12 X 8) on account of loss of income. On account of fracture he will have to be awarded sum of Rs.10,000/-. The Appellant was hospitalised on two occasions. Therefore, some amount will have to be awarded by way of transport

charges and cost of special diet which is quantified at Rs.3,000/-. The Appellant has produced on record large number of bills of expenditure incurred on his medical treatment. Though he claims Rs.10,000/- as expenditure, the bills do not support the said claim. A sum of Rs.5,000/- can be reasonably awarded on account of expenditure incurred on treatment. Thus, the total quantum of compensation comes to Rs.30,000/-. As the Appellant himself contributed to the accident he will be entitled only to 50 per cent of compensation i.e. Rs.15,000/-. The Appellant will be entitled to interest at the rate of 9 per cent per annum.

8. Though a contention was raised by the Respondent No.3 in the Written Statement that the driver of matador was not possessing a valid driving licence, no attempt was made by the Insurance Company to establish any breach of conditions of the Insurance Policy on the part of the owner of the vehicle. Perusal of the record shows that even a notice to produce licence was not issued by the Insurance Company to the driver who was a party to the Application. Therefore, Insurance Company will have to be held liable as policy of insurance is admitted.

9. Hence, Appeal must succeed and I pass the

following order:

: O R D E R :

(i) The impugned Judgment and Award is quashed and set aside.

(ii) The Respondent Nos.1 and 3 are jointly and severally directed to pay a sum of Rs.15,000/- to the Appellants together with interest thereon at the rate of nine per cent per annum from the date of filing of the Claim Petition (i.e. 18th December, 1985) till the realisation of the amount.

(iii) The Appellants will be entitled to proportionate costs throughout from the said Respondents.

(iv) The Respondent Nos.1 and 3 are granted time of three months to comply with this order.

JUDGE